BRIEF ON BEHALF OF APPELLANTS

In The

Supreme Court of the United States

October Term, 1963

No. 69

LEVIN NOCK DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, ET AL.,

Appellants,

v.

HARRISON MANN, ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria

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OPINION OF THE COURT BELOW

The opinion of the three-judge United States District Court for the Eastern District of Virginia, at Alexandria, in this case is reported at 213 F. Supp. 577 as *Mann* v. *Davis*.

THE JURISDICTION OF THE COURT

The jurisdiction of this Court rests on 28 U. S. C., Section 1253.

The final decree of the court below was filed on November 28, 1962. The notice for appeal was filed on December 10, 1962. Probable jurisdiction was noted by this Court on June 10, 1963.

THE STATUTES AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

The validity of two state statutes is involved. Chapter 635, Acts of the General Assembly of Virginia, 1962, p. 1266, codified as Section 24-14 of the Code of Virginia, as amended, 1962 Cumulative Supplement, Volume 5, pp. 137, 138, divided the state into thirty-six (36) senatorial districts. Chapter 638, Acts of the General Assembly of Virginia, 1962, p. 1269, codified as Section 24-12 of the Code of Virginia, as amended, 1962 Cumulative Supplement, Volume 5, pp. 135, 136, 137, created seventy (70) house districts and distributed and apportioned the one hundred (100) members of the House of Delegates throughout such districts for purposes of representation. Due to the length of these statutes they are not here set out verbatim. Their text is set forth as Appendix I to this brief.

The reapportionment statutes were enacted pursuant to the provisions of Section 43 of the Constitution of Virgina which reads as follows:

> "§ 43. Apportionment of Commonwealth into senatorial and house districts. The present apportionment of the Commonwealth into senatorial and house districts shall continue; but a reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter."

THE QUESTIONS PRESENTED

1. Should the court below have declined to entertain jurisdiction in this case in the exercise of its discretion conformably with the doctrine of abstention?

2. Did the court below err in declaring and adjudging that Sections 24-12 and 24-14 of the Code of Virginia (1950), as amended, denied the appellees and those persons similarly situated the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States?

STATEMENT OF THE CASE

This case was heard before a statutory three-judge court on the complaints of the appellees seeking declaratory judgments and permanent injunctions against the enforcement and operation of two reapportionment statutes enacted by the General Assembly of Virginia at its regular session of 1962.

The appellees, original and intervening plaintiffs below, are registered and qualified voters of the Commonwealth of Virginia residing, respectively, in Arlington County, Fairfax County and the City of Norfolk. The appellants, defendants below, are the Secretary of the State Board of Elections, the members thereof, and various local elections officials of Arlington County, Fairfax County, and the City of Norfolk, Virginia.

The judgment of the court below declared Sections 24-12 and 24-14 of the Code of Virginia, as amended, to be unconstitutional and void. The appellants were also restrained and enjoined from proceeding under or pursuant to the said sections, but the enforcement of the injunction was stayed until January 31, 1963, so that (1) the General Assembly of Virginia could be called and convened in special session "to enact appropriate reapportionment statutes under the Constitution of Virginia and the Constitution of the United

States" or so that (2) during the said suspension the appellants might appeal to this Court for review.

Upon the application of the appellants, the execution and enforcement of the judgment of the court below was stayed pending the perfection of this appeal and the final disposition of such appeal by this Court, pursuant to the order of the Chief Justice entered on December 15, 1962.

The only evidence introduced by the appellees in the court below which might be considered material, dealt with population figures. It may be summarized by quoting from the opinion of the majority below (213 F. Supp. at 581-583):

"THE SENATE

"The disparities in the Senate found in the 1962 apportionment acts are pointed up by the plaintiffs' evidence as follows:

"A citizen of Arlington, Fairfax, or Norfolk has representation or voting power in the Senate of *less* than ½ of that possessed by a citizen of any of 6 of the 33 remaining districts in the State. Putting it conversely, his voting power is more than 2-times the voting power of any of the plaintiffs. Further, in 5 more of the districts the power of each vote is *almost twice* that of any plaintiff on an average. Thus ⅓ of the other 33 senatorial districts are nearly 100% richer in each vote's worth than are the plaintiffs' districts:

"In substantiation of this summary the plaintiffs offered in evidence these figures:

"Virginia's 1960 population is 3,966,949. Dividing this total by the number of Senators—40—gives an ideal representation of one Senator for each 99,174 persons.

	Arlington	Fairfax	City of Norfolk
"Population	163,401	285,194	304,869
No of Senators	1	2	2
Population per Senator	163,401	142,597	152,435

District	Population	No. of Senators	Population Per Senator
Brunswick Lunenburg Mecklenburg	61,730	1	61,730
Goochland Louisa Orange Spotsylvania City of Fredericksburg	62,523	1	62,523
Culpeper Fauquier Loudoun	63,703	1	63,703
Clarke Frederick Shenandoah City of Winchester	66,818	1	66,818
Halifax Charlotte Prince Edward City of South Boston	67,100	1	67,100
Dickenson Wise City of Norton	68,803	1	68,803
Bland Giles Pulaski Wythe	72,434	1	72,434

District	Population	No. of Senators	Population Per Senator
Greensville Prince George Surry Sussex Hopewell	72,951	1	72,951
Norfolk County City of South Norfolk (Now City of Chesapeake)	73,647	1	73,647
Dinwiddie Nottoway City of Petersburg	74,074	1	74,074
Appomattox Buckingham Cumberland Powhatan Amherst Nelson Amelia	76,652	1	76,652

Total: 11 districts

"HOUSE OF DELEGATES

"In the House plaintiffs contend that a vote in Fairfax has less than ¼ of the voting force of a vote in 4 districts; ⅓—or less than that—of a vote in at least 16 others; and thus the preferred districts amount to a total of 20 of the other 67 districts in the State. In addition, both Norfolk and Arlington have almost double the individual vote-weight of Fairfax; but these two have only approximately ½ the ballot-potency of

7 districts. The following figures have been adduced to vouch the contention.

"With the State population at 3,966,949 each of the 100 Delegates would presumably represent 39,669 persons.

	Arlington	Fairfax	City of Norfolk
"Population	163,401	285,194	304,869
No. of Delegates	3	3	6
Population per Delegates	54,467	95,064	50,812

District	Delegates	Population	Population Per Delegate
Shenandoah	1	21,825	21,825
Wythe	1	21,975	21,975
Grayson	1	22,644	22,644
Bland	1	23,201	23,201
Loudoun	1	24,549	24,549
Gloucester	1	25,359	25,359
Franklin	1	25,925	25,925
Rockingham	2	52,401	26,200
Buckingham	1	26,385	26,385
Southampton	1	27,195	27,195
Pulaski	1	27,258	27,258
Charlotte	1	27,489	37,489
Alleghany	1	28,458	28,458
Greensville	1	28,566	28,566
Pittsylvania	2	58,296	29,148
Fluvanna	1	29,392	29,392
City of Charlottesville	1	29,427	29,427
Fauquier	1	29,434	29,434
City of Petersburg	2	58,933	29,466
Amelia	1	29,703	29,703
Total: 20 districts"			

The appellants introduced twelve (12) exhibits in the court below. They may be summarized as follows:

1. Defendant's Exhibit No. 1, which is the annual report of the Virginia Alcoholic Beverage Control Board, shows, beginning on page 48, the number of incorporated towns located in the various counties of Virginia (R. 237).

2. Defendant's Exhibit No. 2, a letter of Mr. Richard M. Scammon, Director of the Bureau of Census, dated September 20, 1962, certified that the number of males 14 years and over in the labor force reported as in the armed forces as of April 1, 1960, for the county of Arlington, Virginia, was 10,628 (R. 250).

3. Defendants' Exhibit No. 3 shows the population of each State according to the 1960 census, the number of electors allotted to each State and the population per elector based upon the 1960 census. The smallest population per elector exists in Alaska, with 88,722 inhabitants per elector; the largest population per elector exists in California with 392,930 inhabitants per elector. In several other states, i.e., Florida, Illinois, Indiana, Massachusetts, Michigan, Pennsylvania and Texas, the population variance per elector as compared to Alaska is substantially as great as that which exists between California and Alaska (R. 252, 253).

4. Defendants' Exhibit No. 4 contains apportionment data of New York State as shown by the opinion of the three-judge District Court in *W.M.C.A., Inc.* v. *Simon*, 208 F. Supp. 368. This data shows the population variance ratio between the largest and smallest Senate and Assembly districts in New York based upon population. The largest Senate district has a population of 666,784; the smallest Senate district had a population of 168,398—a population variance ratio of approximately 3.96 to 1. The largest

Assembly district had a population of 222,261; the smallest Assembly district had a population of 15,044—a population variance ratio of approximately 14.1 to 1 (R. 254).

5. Defendants' Exhibits Nos. 5 and 6 show the rank order of Virginia in comparison with other States, based upon population, before and after the 1962 reapportionment statutes were enacted by the General Assembly of Virginia. These exhibits were prepared by the Bureau of Public Administration of the University of Virginia and Exhibit No. 5 established that Virginia ranks eighth in the United States in fair representation, based solely on population, subsequent to the 1962 reapportionment legislation (R. 262, 268).

6. Defendants' Exhibits Nos. 7, 8, 9 and 10 compare rural and urban representation in the Senate and House of Delegates of Virginia and establish that no discrimination exists in favor of rural areas as against urban areas (R. 273, 282, 293, 303).

7. Defendants' Exhibit No. 11, United States Census of Population, 1960 (Virginia) gives the total military personnel in Virginia at page 48-395. Table 115 indicates that the number of persons fourteen years of age and over residing in Fairfax County and in the armed forces of the United States totals 16,693 (R. 318, 319, 320, 321), and that the number of such persons residing in the City of Norfolk totals 44,381.

8. Defendants' Exhibit No. 12 is a statement made by the Governor of Virginia when he signed the 1962 reapportionment statutes of Virginia, now codified as Sections 24-12 and 24-14 of the Virginia Code (R. 322).

SUMMARY OF ARGUMENT

I.

The Court Below Should Have Declined to Entertain Jurisdiction in This Case in the Exercise of Its Discretion Conformably with the Doctrine of Abstention

The facts and circumstances surrounding this case are entirely different from those involved in apportionment decisions handed down since *Baker* v. *Carr*, 369 U. S. 186.

1. The General Assembly of Virginia has faithfully followed the mandate to reapportion found in Section 43 of the Virginia Constitution of 1902, as amended.

2. The appellees have an adequate remedy in the courts of this state.

3. The courts of this state have not refused to consider the relief requested by the appellees.

4. Section 43 of the Virginia Constitution has not been construed by the state courts and construction thereof is vital to a final determination of the issue presented by the appellees.

It is conceded that the appellees have an appropriate and adequate remedy in the state courts of Virginia. *Brown* v. *Saunders*, 159 Va. 28, 166 S. E. 105 (1932) and *Baker* v. *Carr, supra*. It must also be conceded that this case involves an area which vitally affects the independence of state governments, for without Sections 24-12 and 24-14 of the Code of Virginia, as amended, the Commonwealth of Virginia could not function. Under such circumstances, the doctrine of equitable abstention must be applied, or discarded as a time-honored principle of equity.

Without doubt, the facts and circumstances set forth above required the majority below, in the exercise of discretion, to abstain from hearing this case on its merits. The decisions of this Court support this position. *Pennsylvania* v. *Williams*, 294 U. S. 176; *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368; *Government & C.E.O.C., CIO* v. *Windsor*, 353 U. S. 364; *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167; *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U. S. 25; and *Martin* v. *Creasy*, 360 U. S. 219. Compare, *County of Alleghany* v. *Mashuda*, 360 U. S. 185.

As a matter of law, few public interests have a higher claim upon the discretion of a federal chancellor than avoidance of needless friction between state and federal governments and avoidance of federal constitutional questions which may become unnecessary to consider because of state judicial construction. Consistent with these fully precedented principles, the doctrine of abstention should have been applied by the majority below.

II.

Sections 24-12 and 24-14 of the Virginia Code Are Not Violative of the Fourteenth Amendment to the Constitution of the United States

The only discrimination alleged—or attempted to be established by appellees' proof—in the case at bar is one exclusively of numbers and is predicated upon numerical disparities alleged to exist among the populations embraced in certain of the House and Senate districts established by the challenged statutes. No suggestion is made that the statutes in question discriminate against any individual, group or district upon the basis of race, creed, racial origin, political persuasion or rural-urban character.

In ascertaining these population figures, no consideration was given, either by the appellees or the majority jurists in the court below, to military related population—which population (because if its transient, mobile, non-citizen character) could properly have been excluded by the General Assembly of Virginia in fixing the number of inhabitants of each House and Senate district for the purpose of representation. Appellants assert that such classification of inhabitants for the purpose of representation is *not* unreasonable, and appellees made no attempt to demonstrate that such classification *is* unreasonable.

The population variance ratios upon which appellees rely, which *include* military related population, are well within the limits allowable under the Fourteenth Amendment as interpreted and applied in a host of decisions rendered by State and Federal courts since the advent of *Baker*.

Based solely upon population, including military related population, Virginia ranks 8th in the United States in fairness of representation subsequent to the enactment of the challenged statute, according to an uncontested exhibit prepared by the Bureau of Public Administration of the University of Virginia. Invalidation of the Virginia reapportionment system necessarily entails invalidation of the reapportionment systems of every other State in the Union with the possible exception of the seven States in which more proportionate representation is available, e.g., Oregon, Massachusetts, New Hampshire, West Virginia, Maine, Wisconsin and Alaska. See, *Mann* v. *Davis, supra*, at 589 (dissenting opinion). In at least seven of those States which rank below Virginia in fairness of representation, based solely on population, e.g., Florida, Idaho, Louisiana, Maryland, New Jersey, New York and Ohio, reapportionment plans have already been judicially approved under the Fourteenth Amendment by either State or Federal courts.

The most excessive population variance ratio in Virginia, *based solely on population*, does not exceed that which exists in the Electoral College of the United States. Appellants submit that no invidious discrimination antagonistic to the Fourteenth Amendment can exist with respect to any reapportionment system which contains no population variance ratio which exceeds that of the Electoral College.

The jurists constituting the majority in the court below did not attempt to harmonize their conclusion with—indeed, did not even mention—the decisions of three-judge Federal District Courts in the Florida and New York cases. See, *Sobel* v. *Adams*, 208 F. Supp. 316; *W.M.C.A., Inc.* v. *Simon*, 208 F. Supp. 368, probable jurisdiction noted ..... U. S. ..... Moreover, the majority opinion of the court below made no reference to any factor other than population figures and gave no consideration to the factors of military related population, relative size of various districts, number of political subdivisions in various districts or density of population in various districts. Appellants assert that each of these factors must be considered in determining the validity of the Virginia reapportionment system under the Fourteenth Amendment.

ARGUMENT

I.

The Court Below Should Have Declined to Entertain Jurisdiction in This Case in the Exercise of Its Discretion Conformably with the Doctrine of Abstention

The doctrine of equitable abstention is here involved and it seems appropriate to state first that the facts and circumstances surrounding this case are entirely different from those involved in apportionment decisions handed down since *Baker* v. *Carr*, *supra*.

1. The General Assembly of Virginia has faithfully followed the mandate to reapportion found in section 43 of the Virginia Constitution of 1902, as amended.[1]

2. The appellees have an adequate remedy in the courts of this state.

3. The courts of this state have not refused to consider the relief requested by the plaintiffs.

4. Section 43 of the Virginia Constitution has not been construed by the state courts and construction thereof is vital to a final determination of the issue presented by the plaintiffs.

5. A serious federal constitutional question may be avoided by invoking the doctrine of abstention in this case.

As this Court knows, abstention is invoked by a federal court of equity in furtherance of an established public policy which has been well stated in *Pennsylvania* v. *Williams*, 294 U. S. 176, 185:

> "* * * It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy. * * *".

[1] Since 1900 the House of Delegates has been reapportioned by the following acts: Acts of 1906, p. 84; Acts of 1910, p. 9; Acts of 1922, p. 463; Acts of 1923, p. 17; Acts of 1932, p. 337; Acts of 1942, chapt. 387; Acts of 1948, p. 803; Acts of 1952, Ex. Sess., Chapt. 18; Acts of 1958, Chapt. 33; and Acts of 1962, chapt. 638.

Since 1900 the Senate of Virginia has been reapportioned by the following acts: Acts of 1901-2, p. 800; Acts of 1922, p. 463; Acts of 1923, p. 17; Acts of 1934, p. 252; Acts of 1942, chapt. 387; Acts of 1948, p. 805; Acts of 1952, Ex. Sess. Chapt. 17; Acts of 1958, chapt. 333; and Acts of 1962, chapt. 635.

As to restraining state officers, this Court has said in *Hawks* v. *Hamill*, 288 U. S. 52:

> "* * * Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such time if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal courts in restraint of state officials *though the rights asserted by the complainants are strictly federal in origin.* (288 U. S. 61, 77 L. Ed. 619) (Italics supplied)

In *Matthews* v. *Rodgers*, 284 U. S. 521, this was said:

> "* * * The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. * * *" (284 U. S. p. 525, 76 L. Ed. at p. 452.) See also, *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 87 L. Ed. 1407.

Mr. Justice Frankfurter, speaking for this Court in *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496—a case involving an attempt to enjoin an order of the Texas Railroad Commission—elaborated upon the principle under consideration in the following language (312 U. S. at pp. 500-501):

> "An appeal to the chancellor, as we had occasion to recall only the other day, is an appeal to the 'exercise of the sound discretion, which guides the determination of courts of equity.' Beal v. Missouri P. R. Corp. No.

72, decided January 20, 1941 [312 US 45, ante, 577, 61 S Ct 418]. The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. * * * *Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law.* Fenner v. Boykin, 271 US 240, 70 L.Ed. 927, 46 S Ct. 492; Spielman Motor Sales Co. v. Dodge, 295 US 89, 79 L.Ed. 1322, 55 S Ct. 678; or the administration of a specialized scheme for liquidating embarrassed business enterprises, Pennsylvania v. Williams, 294 US 176, 79 L.Ed. 841, 55 S Ct 380, 96 ALR 1166; or the final authority of a state court to interpret doubtful regulatory laws of the state, Gilchrist v. Interborough Rapid Transit Co., 279 US 159, 73 L.Ed. 652, 49 S Ct 282; cf. Hawks v. Hamill, 288 US 52, 61, 77 L.Ed. 610, 618, 53 S Ct 240. *These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion' restrain their authority because of 'scrupulous regard for the rightful independence of the state government,' and for the smooth working of the federal judiciary.* See Cavanaugh v. Looney, 248 US 453, 457, 63 L.Ed. 354, 358, 39 S Ct 142; Di Giovanni v. Camden F. Ins. Asso., 296 US 64, 73, 80 L.Ed. 47, 53, 56 S Ct 1. *This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of these powers.* * * * Regard for these important considerations of policy in the administration of federal equity jurisdiction is decisive here. * * * In the absence of any showing that obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands. * * *" (Italics supplied)

A mere reading of the complaints filed and the state statutes challenged in this proceeding clearly establishes that this case is one in which the plaintiffs below asked the three-judge district court to enjoin state officials from enforcing state statutes which are of such primary importance that the state government could not function without them.

Sections 24-12 and 24-14 of the Code of Virginia, as amended, apportion the state into senatorial and house districts. Without them, the independence of the Commonwealth of Virginia would be destroyed. Under such circumstances, the doctrine of equitable abstention must be applied or discarded as a time-honored principle of equity. Certainly, this Court has dealt with no state statute in applying abstention that so vitally affects "the rightful independence of state governments in carrying out their domestic policy" as the reapportionment statutes.

In the case of *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, the complainants sought an injunction restraining the officers of the territory of Hawaii from enforcing an Act, "Regulating the Teaching of Foreign Languages to Children," against the teaching of foreign languages to their pupils.

The only sanction for enforcement of the Act was by injunction and the "complaint alleged that, in violation of the Fifth Amendment, the Act deprived plaintiff schools of the right to manage their property by contracting with instructors and parents for the teaching of Chinese, and the plaintiff teacher of Chinese of his right to follow his occupation" (336 U. S. at p. 373)

The language of the Act in question was not ambiguous and its application appeared clear.[2] This Court held, how-

[2] The text of Act is discussed and a part thereof is set forth as footnotes 3 and 4 at 336 U. S. 371, 372 and 93 L. Ed. 746.

ever, that the complaint "called for broad consideration of the application of the Act to foreign language schools and teachers * * * [and] had not been construed by the Hawaiian courts" (336 U. S. at p. 383).

It was pointed out that there was no reason to fear a court of equity and that there was every reason to believe that the plaintiffs' constitutional rights would be fully protected in the equity courts of the Territory and that an appeal, if need be, could be taken to this Court.

The *Stainback* case was remanded with directions to dismiss the complaint, this Court saying:

> "* * * We think that where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state or territory should, as a matter of discretion, be left by the federal courts to the courts of the legislating authority unless exceptional circumstances command a different course. We find no such circumstances in this case." (336 U. S. at pp. 383-384; 93 L.Ed. at p. 752)

What "circumstances command a different course" which was demanded by the plaintiffs below? They declared that the Supreme Court of Appeals of Virginia is powerless to act in this case. *Brown* v. *Saunders,* 159 Va. 28, 166 S. E. 105, was cited in support of such a declaration. A perusal of this decision is not even necessary to conclude that the appellees *do* have an adequate remedy in the courts of Virginia.

Brown v. *Saunders* was an original petition in the Supreme Court of Appeals of Virginia asserting that Chapter 23, Acts of Assembly of Virginia, 1932, which divided the state into congressional districts, was void as being in con-

flict with Section 55 of the State Constitution. The Court of Appeals, holding that the said chapter was invalid, said:

> "When a State legislature passes an apportionment bill, it must conform to constitutional provisions prescribed for enacting any other law, and whether such requirements have been fulfilled is a question to be determined by the court when properly raised. Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795; Carroll v. Becker, 285 U.S. 380, 52 S. Ct. 402, 76 L.Ed. 807; Koenig v. Flynn, 285 U.S. 375, 52 S. Ct. 403, 76 L.Ed. 805. If the validity of an apportionment act with respect to compliance with the constitutional requirements as to the manner of its adoption is subject to judicial review, it follows that if the provisions in question constitute limitations upon the legislative power of apportionment (as we think they do), then whether those limitations have been exceeded is likewise a question for judicial determination. The legal question involved is whether or not the act of the legislature is in conflict with the mandate of the Constitution." (159 Va. at pp. 35-36)

It is plain that the highest court in Virginia has recognized since 1932 that the question of the validity of an apportionment statute presents a judicial question under the Virginia Constitution. It is equally plain that the courts of this state will recognize, in light of *Baker* v. *Carr, supra,* the question of the validity of an apportionment statute under the Fourteenth Amendment. The Federal courts do not presume that "Virginia courts will not do their full duty in judging these statutes in light of state and federal constitutional requirements." *Harrison* v. *NAACP,* 360 U. S. 167, 178.

It is not here urged that the three-judge district court does not have jurisdiction under the Civil Rights Act, but

this fact of jurisdiction does not mean that the doctrine of abstention should not be applied. *Harrison* v. *NAACP, supra.*

A series of decisions rendered by this Court on June 8, 1959, convincingly demonstrates that the principle under consideration has not been enervated by the passage of time and that it applies with undiminished vitality to present day litigation. See *Harrison* v. *NAACP, supra; Louisiana Power & Light Co.* v. *Thibodaux*, 360 U. S. 25, *reh. den.* 360 U. S. 940; *Martin* v. *Creasy*, 360 U. S. 219; *County of Alleghany* v. *Mashuda Co.*, 360 U. S. 185.

In *Harrison* v. *NAACP, supra,* a suit challenging the validity and seeking to restrain enforcement of five statutes of the Commonwealth of Virginia, this Court held that the three-judge District Court which originally entertained the proceedings "should have abstained from deciding the merits of the issues tendered it, so as to afford the Virginia Courts a reasonable opportunity to construe" three of the statutes which the District Court had declared invalid and enforcement of which it had permanently enjoined. Commenting upon the propriety of this view, this Court observed:

> "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts,' *Matthews* v. *Rodgers*, 284 U. S. 521, 525, as their 'contribution . . . in furthering the harmonious relation between state and federal authority. . . .' *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 501. * * *" (360 U. S. at p. 176)

In *Louisiana Power & Light Co. v. Thibodaux, supra,* this Court reversed a judgment of the Court of Appeals for the Fifth Circuit for the Eastern District of Louisiana staying further proceedings in an expropriation suit, pending in the District Court, until the Supreme Court of Louisiana had been afforded an opportunity to interpret the Louisiana statute upon which the city's authority to expropriate was predicated. Particularly pertinent to the issue presented in the case at bar are certain portions of the dissenting opinion. Although expressing the view that the failure of the District Court to exercise jurisdiction was inappropriate under the circumstances of that case—primarily because no injunctive relief, which would have prohibited State officials from acting, was sought and because the case did not involve the potential friction which results when a federal court applies paramount federal law to strike down state action—the dissenting justices nevertheless fully acknowledged "the two recognized situations justifying abstention" and commented upon them in the following language:

> "* * * The doctrine of abstention originated in the area of the federal courts' duty to avoid, if possible, decision of a federal constitutional question. This was Railroad Com. v. Pullman Co., 312 US 496, 85 L.Ed. 971, 61 S.Ct. 643. * * * Numerous decisions since then have sanctioned abstention from deciding cases involving a federal constitutional issue where a state court determination of state law might meet the issue or put the case in a different posture. * * * Abstention has also been sanctioned on grounds of comity with the States—to avoid a result in 'needless friction with state policies.' The Railroad Com. v. Pullman Co., 312 US 496, 500, 85 L. Ed. has upheld an abstention when the exercise by the federal court of jurisdiction would disrupt a state administrative process, Burford v. Sun Oil

> Co., 319 US 315, 87 L.Ed. 1424, 63 S. Ct. 1098; Pennsylvania v. Williams, 294 US 176, 79 L.Ed. 841, 55 S.Ct. 380, 96 ALR 1166, interfere with the collection of State taxes. Toomer v. Witsell, 334 US 385, 392, 92 L.Ed. 1460, 1469, 68 S.Ct. 1156; Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 87 L.Ed. 1407, 63 S.Ct. 1070, or otherwise create needless friction by unnecessarily enjoining state officials from executing domestic policies, Alabama Public Service Com. v. Southern R. Co., 341 U.S. 341, 95 L.Ed. 1002, 71 S.Ct. 762; Hawks v. Hamill, 288 U. S. 52, 77 L. Ed. 610, 53 S. Ct. 240." (360 US at pp. 32-33)

To the same effect is the decision in *Martin* v. *Creasy, supra,* in which a decision of the District Court for the Western District of Pennsylvania improvidently enjoining enforcement of the Pennsylvania Limited Access Highways Act of 1945 was reversed.

So far as counsel for appellants have been able to discover, *County of Alleghany* v. *Mashuda Co., supra,* represents the only case decided contemporaneously with *Harrison* v. *NAACP, supra,* in which this Court held that a District Court impermissibly abstained from exercising its properly invoked jurisdiction. In that case, as this Court emphasized in the initial paragraph of its opinion, the exercise of such jurisdiction under the circumstances of that case, "*would not entail the possibility of a premature and perhaps unnecessary decision of a serious federal constitutional question, would not create the hazard of unsettling some delicate balance in the area of federal-state relationships, and would not even require the District Court to guess at the resolution of uncertain and difficult issues of state law.*" (Italics supplied.) Distinguishing the situation there presented from those existing in prior cases in which abstention had been approved, this Court noted:

"This Court has sanctioned a federal court's postponement of the exercise of its jurisdiction in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law. * * * *But there are no federal constitutional questions raised in this case.*

"This Court has also upheld an abstention on grounds of comity with the States when the exercise of jurisdiction by the federal court would disrupt a state administrative process; *Burford* v. *Sun Oil Co.*, 319 U.S. 315; *Pennsylvania* v. *Williams*, 294 U. S. 176, interfere with the collection of state taxes, *Toomer* v. *Witsell*, 344 U.S. 385, 392; *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, *or otherwise create a needless friction by unnecessarily enjoining state officials from executing domestic policies, Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 US 341; *Hawks* v. *Hammill*, 288 US 52. *But adjudication of the issues in this case by the District Court would present no hazard of disrupting federal-state relations. The respondents did not ask the District Court to apply paramount federal law to prohibit state officials from carrying out state domestic policies, nor do they seek the obvious irritant to state-federal relations of an injunction against state officials.* The only question for decision is the purely factual question whether the County expropriated the respondents' land for private rather than for public use. * * *" (360 US at pp. 188-89-90) (Italics supplied)

See, also, *Clay* v. *Sun Ins. Office*, 363 U. S. 207 and *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U. S. 134.

An examination of the facts and of the state statutes involved in such cases as *Government & C. E. O. C., CIO* v. *Windsor*, 353 U. S. 364; *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U. S. 341; and *Albertson* v. *Millard*, 345 U. S. 242, reveal that the doctrine of absten-

tion may be applied even though the provisions of a state statute may appear to be free of doubt and ambiguity. The dissenting justices in *Louisiana Power and Light Co.* v. *Thibodaux, supra,* recognized this when they stated that the doctrine of abstention may be applied to avoid "the hazard of unsettling some delicate balance in the area of federal-state relationships." Once again, it is hard to imagine a more delicate subject with which to deal than the apportionment statutes of a state.

While, of course, it may not be said that Sections 24-12 and 24-14 of the Code of Virginia, as amended, present problems of statutory construction while standing alone, this may not be said for the provision of the Virginia Constitution pursuant to which such sections were enacted. This provision reads as follows:

> "§ 43. Apportionment of Commonwealth into senatorial and house districts. The present apportionment of the Commonwealth into senatorial and house districts shall continue; but a reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter."

The present Section 43 was ratified on June 19, 1928 and was rewritten merely to bring it up to date. The original section as found in the Virginia Constitution of 1902 reads as follows:

> "§ 43. Apportionment of State into senatorial and house districts. The apportionment of the State into senatorial and house districts, made by the acts of the General Assembly, approved April the second, nineteen hundred and two, is hereby adopted; but a re-apportionment may be made in the year nineteen hundred and six, and shall be made in the year nineteen hundred and twelve, and every tenth year thereafter."

No case, other than *Alexandria* v. *Alexandria County*, 117 Va. 230, 84 S. E. 630, which dealt with an annexation statute and its possible conflict with Section 43, has been found involving this constitutional provision. What is its proper construction when considering apportionment statutes enacted pursuant thereto? What factors must the General Assembly of Virginia consider in passing apportionment statutes required by the mandate of Section 43? No guides or standards are provided. Compare, Section 55 of the Virginia Constitution, dealing with the apportionment of the State into congressional districts, wherein it is provided that the districts "shall be composed of contiguous and compact territory containing as nearly as practical, an equal number of inhabitants."

Section 43 provides only that "reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter." This requires the members of the first regular session of the General Assembly meeting after the taking of each ten-year federal census to reapportion the State. Does this mean that population alone must be considered? Is precise mathematical equality required by Section 43? Or may the General Assembly recognize historical, political and geographical subdivisions as well as such standards as community of interests when redistricting house and senate seats?

The answers to the above questions may be determined authoritatively and finally *only* by state courts. "No matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination." *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496. To the same effect, *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168.

In *Leiter Minerals Inc.* v. *United States*, 352 U. S. 220,

229, this Court said that federal courts should not decide constitutional questions "on the basis of preliminary guesses regarding local law." *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101.

In passing the apportionment statutes of 1962, has the General Assembly followed the mandate of Section 43 of the Virginia Constitution? An answer requires an interpretation of Section 43, and it is possible for the state courts of Virginia to hold that the answer is in the negative. In such event, a decision on the serious federal constitutional question brought before this Court would be unnecessary.

One of the most sound and logical reasons for invoking the doctrine of abstention is that an authoritative construction of a state statute, *a fortiori*, a provision of a state constitution, may void the necessity for determining a federal constitutional question. Some of the justices of this Court, who have expressed the fear in some dissenting opinions that a majority of the Court has unjustifiably broadened the doctrine of abstention, recognize that the doctrine of abstention should be applied in such cases as this. It was said in the dissenting opinion in *Louisiana Power and Light Co.* v. *Thibodaux, supra*, that the doctrine of abstention required the parties to repair to the state courts in order to avoid "a premature and perhaps unnecessary decision of a serious federal constitutional question" (360 U. S. at p. 32). To the same effect, see the majority opinion in *Harrison* v. *NAACP, supra*, wherein Mr. Justice Harlan, speaking for the Court, said that while the doctrine of abstention does not, of course, "involve the abdication of federal jurisdiction" it should always be applied to "avoid in whole or in part the necessity for federal constitutional adjudication" (360 U. S. at p. 177).

In this connection, it is of interest to note that there is

now pending in the Circuit Court of the City of Richmond, Virginia, a case with Fourteenth Amendment issues identical to the ones now before this Court. The case is entitled, *Tyler* v. *Davis*, Chancery Docket No. 7946-C, and copies of the Bill of Complaint, Answer and Cross-Bill and Answer to Cross-Bill are attached as Appendix II to this brief.

The intervenors' complaint in the case at bar was filed in the court below by voters residing in the City of Norfolk who sued "on their own behalf and on behalf of all other voters similarly situated in the Commonwealth of Virginia" (R. pp. 32 and 35). The Complaint pending in the state court likewise was brought by voters residing in the City of Norfolk on behalf of themselves and others similarly situated (see Appendix II). The appellees in this case and the defendants in the case of *Tyler* v. *Davis, supra*, are the same, namely, the state election officials and the local election officials of Norfolk.

The plaintiffs in the state case introduced the same evidence that is now before this Court. The defendants, the appellants here, also introduced the same evidence now before this Court, together with certain exhibits and testimony of experts showing a rational and practical justification for exclusion of the military and the military related population in the City of Norfolk and Arlington and Fairfax counties by reason of the fundamentally transient nature, the high mobility rate and the essentially non-citizen character of such population.

This state case of *Tyler* v. *Davis* has been argued orally by counsel and briefs have been submitted. The Circuit Court of the City of Richmond clearly has before it the question of whether Sections 24-12 and 24-14 of the Code of Virginia violate either Section 43 of the Constitution of Virginia or the Fourteenth Amendment to the Constitution

of the United States. A decision on these questions may well be rendered by the state court prior to the argument of the case at bar before this Court. An appeal from a decision of the Circuit Court of the City of Richmond may be taken to the Supreme Court of Appeals of Virginia and then to this Court, if a federal question under the Fourteenth Amendment remains.

Under all of the circumstances described above, the doctrine of abstention should be invoked, for it would appear from the cases hereinabove cited that this Court has consistently applied this doctrine either to avoid friction in the area of federal-state relationships or to avoid a premature or unnecessary federal constitutional question.

II.

Sections 24-12 and 24-14 of the Virginia Code Are Not Violative of the Fourteenth Amendment to the Constitution of the United States

The case at bar is but one of a multitude of reapportionment suits which have been instituted in both State and Federal courts in the wake of the historic decision of this Court in *Baker* v. *Carr*, 369 U. S. 186. In that case, certain citizens of the State of Tennessee instituted a civil action to redress an alleged deprivation of federal constitutional rights, asserting that the then existing Tennessee statute apportioning the members of the General Assembly of Tennessee among the State's political subdivisions denied plaintiffs the equal protection of the laws accorded them by the Fourteenth Amendment by virtue of the debasement of their votes. As various courts have subsequently had occasion to emphasize, the decision in *Baker* is as important for what was *not* decided as for what was decided. In this connection, the clearest expression of the scope of that decision—as well as the most forceful restatement of numerous well settled

precedents left undisturbed by it—is that of Mr. Justice Stewart, who concurred in the majority opinion with the following declaration (369 U. S. at 265-266):

> "The Court today decides three things and no more: '(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) . . . that the appellants have standing to challenge the Tennessee apportionment statutes.' . . .
>
> "The complaint in this case asserts that Tennessee's system of apportionment is utterly arbitrary—without any possible justification in rationality. The District Court did not reach the merits of that claim, and this Court quite properly expresses no view on the subject. Contrary to the suggestion of my Brother Harlan, the Court *does not say or imply* that 'state legislatures must be so structured as to reflect with approximate equality the voice of every voter.' Infra, p. 752. The Court *does not say or imply* that there is anything in the Federal Constitution 'to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper and customs of its people.' Infra, pp. 752, 753. And contrary to the suggestion of my Brother Douglas, the Court *most assuredly does not decide* the question, 'may a State weight the vote of one county or one district more heavily than it weights the vote in another?' Supra, p. 701.
>
> "In MacDougall v. Green, 335 U.S. 281, 93 L. ed 3, 69 S. Ct. 1, the Court held that the Equal Protection Clause does not 'deny a State the power to assure a proper diffusion of political initiative *as between its thinly populated counties and those having concentrated masses*, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.' 335 U.S., at 284. In case after case arising under the Equal Protection

> Clause the Court has said what it said again only last Term—that 'the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others.' McGowan v. Maryland, 366 U.S. 420, 425, 6 L. ed 2d 393, 399, 81 S Ct 1101. In case after case arising under that Clause we have also said that 'the burden of establishing the unconstitutionality of a statute rests on him who assails it.' Metropolitan Casuality Ins. Co. v. Brownell, 294 U. S. 580, 584, 79 L ed 1070, 1072, 55 S Ct 538.
>
> *"Today's decision does not turn its back on these settled precedents.* I repeat, the Court today decides only: (1) that the District Court possessed jurisdiction of the subject matter; (2) that the complaint presents a justiciable controversy; (3) that the appellants have standing." (Italics supplied)

In the landmark opinion in Baker, the individual members of this Court stressed various aspects of that case which serve to distinguish it completely from the case at bar. Speaking for the Court, Mr. Justice Brennan pointed out that "Tennessee's standard for allocating legislative representation among her counties is the total number of qualified voters resident in the respective counties subject only to minor qualifications," that between 1901 and 1961 there had been no decennial reapportionment in compliance with the constitutional scheme even though Tennessee had experienced "substantial growth and redistribution of her population" and that the substance of the appellant's claim was that the existing (1901) reapportionment statute manifested an "irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population." *Id.* at 189-192, 207. *No such situation exists in the case at bar.*

Commenting upon the "gross disproportion" of representation mentioned above, Mr. Justice Douglas noted the assertion that "a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County, that one vote in Stewart or in Chester County is worth eight times a single vote in Shelby or Knox County." *Id.* at 249. *No comparable situation exists, or is alleged to exist, in the case at bar.*

With respect to the operation of the Tennessee reapportionment statute as applied to rural and urban areas of the State, Mr. Justice Clark observed that the statute "discriminates horizontally creating gross disparities between rural areas themselves as well as between urban areas themselves, still maintaining the wide vertical disparity already pointed out between rural and urban." *Id.* at 256. He also emphasized the "frequency and magnitude of the inequalities" in the Tennessee districting and the circumstances that the people of Tennessee would be "saddled with the present discrimination in the affairs of their State government" in the absence of federal judicial intervention. *Id.* at 259. *No such situation exists, or is alleged to exist, in the case at bar.*

On the contrary, the claim of the unconstitutionality of the Virginia reapportionment statutes set up in plaintiffs' complaint and sought to be established by plaintiffs' proof is predicated *exclusively* upon numerical disparities which are alleged to exist among the populations embraced in certain of the House and Senate districts established by Sections 24-12 and 24-14 of the Virginia Code. In light of these alleged disparities, the majority of the court below found "unconstitutional, invidious discrimination" adverse to Arlington County, Fairfax County and the City of Norfolk. They held that the appellees had proved inequities on the basis of population and that the appellants had not carried the burden of adducing evidence which might explain

such inequities. By this holding, the majority not only ignored the evidence introduced by the appellants in the court below, but also refused to apply the principle long established by this Court, that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U. S. 420, 426; *Baker* v. *Carr*, *supra*.

As indicated by Plaintiffs' Exhibit "D" to Complaint (R. 22, 24), the largest House district in Virginia on a population per representative basis is District 27 (Fairfax County, Falls Church and Fairfax City) which has a population of 95,064 for each of its three members of the House, while the smallest such district on a population per representative basis is District 64 (Shenandoah County) which has a population of 21,825 for its one member of the House—a population variance ratio of 4.36 to 1. See, Plaintiffs' Exhibit 15 (R. 197). As indicated by Plaintiffs' Exhibit "C" to Complaint (R. 18), the largest Senate district on a population per representative basis is District 9 (Arlington County) which has a population of 163,401 for its one member of the Senate, while the smallest such district on a population per representative basis is District 7 (Brunswick, Lunenburg and Mecklenburg Counties) which has a population of 61,730 for its one member of the Senate—a population variance ratio of 2.65 to 1. See, Plaintiff's Exhibit 15 (R. 197).

As counsel for appellants will demonstrate in this brief, these population variance ratios are well within the limits allowable under the equal protection standard of the Fourteenth Amendment as interpreted and applied in a host of decisions rendered by State and Federal courts since the advent of *Baker*. However, at the inception of any consideration of the population variances which forms the entire

substance of plaintiff's case, counsel for appellants submit that the above-mentioned ratios do not constitute the appropriate ratios by which the validity of the Virginia reapportionment statute must be judged.

As indicated, the most excessive population variance ratio under the Virginia reapportionment system with respect to the House of Delegates is 4.36 to 1, and the most excessive population variance ratio under the Virginia reapportionment system with respect to the Senate is 2.65 to 1. These ratios are based upon population figures *which include military personnel, their wives and children*, i.e., military related population. It is the position of the appellants (1) that such military related population may properly be excluded in the determination of the number of inhabitants of a House or Senate district for purposes of representation in the General Assembly of Virginia and in establishing the resulting population per representative figure in the House and Senate and (2) exclusion of such military related population substantially reduces the population variance ratios under consideration.

As a prelude to a consideration of this contention, counsel for appellants wish to reemphasize the firmly precedented rule that a legislative classification assailed under the Fourteenth Amendment will not be invalidated by the judiciary if any state of facts reasonably may be conceived which would sustain it. Proof that such state of facts was actively contemplated by the Legislature is wholly unnecessary. This general principle is well stated in 12 Am. Jur. 214. Presumptions and Burden of Proof, Section 521, in the following language:

> "In accordance with the basic rules of constitutional law underlying court review of legislation assailed as

> unconstitutional, in those cases in which laws are attacked as violating the equality requirements of the Federal and state Constitutions *there is a presumption in favor of a legislative classification*, of the reasonableness and fairness of legislative action, and of legitimate grounds of distinction, if any such grounds exist, on which the legislature acted. Hence, when the classification in a law is called in question, *if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.*" (Italics supplied)

The above-stated principle has been repeatedly affirmed by this Court. One of the most recent assertions of the rule in a case not involving legislative reapportionment appears in *McGowan* v. *Maryland, supra*, in which case the Court observed (366 U. S. at 425-426):

> "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.* See Kotch v. Board of River Port Pilot Comrs., 330 US 552, 91 L ed 1093, 67 S Ct 910; Metropolitan Casualty Ins. Co. v. Brownell, 294 US 580, 79 L ed 1070, 55 S Ct 538; Lindsley v. Natural Carbonic Gas Co., 220 US 61, 55 L ed 369, 31 S Ct 337, Ann Cas 1912C 160; Atchison, T. & S. F. R. Co. v. Matthews, 174 US 96, 43 L ed 909, 19 S Ct 609." (Italics supplied)

Moreover, in *Morey* v. *Doud*, 354 U. S. 457, 463-464, the rules for testing an alleged discrimination under the Fourteenth Amendment were summarized in the following language:

> "'1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. *A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.* 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. *One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.*'" (Italics supplied)

That these rules apply with equal vitality in reapportionment cases is evidenced by the previously quoted declaration of Mr. Justice Stewart in *Baker*. *Ante*, p. 30. See, also, *Maryland Committee for Fair Representation* v. *Tawes*, 180 A. (2d) 656, 668; *Jackman* v. *Bodine*, 188 A. (2d) 642, 647.

If the General Assembly of Virginia could reasonably exclude military related population in determining the number of inhabitants of each House and Senate district for purposes of representation, and if the Virginia reapportionment system—viewed in the light of such exclusion—effects no invidious discrimination against the citizens of any district, it is manifest from the above-cited authorities that the challenged statutes must be sustained.

Initially in this connection, it should be noted that the constitutions of Alaska, Washington and Wisconsin contain express provisions for the exclusion of soldiers, sailors and officers in the military service, or noncivilian inhabitants, in determining the population of those

States for representative purposes. See, Constitution of Alaska, Article VI, Sections 4 and 5; Constitution of Washington, Article II, Section 3; Constitution of Wisconsin, Article IV, Section 3. Moreover, prior to its amendment in 1948, the constitution of South Dakota made similar provision for the exclusion of military personnel for such purposes. See, Constitution of South Dakota, Article III, Section 5. It is thus clear that firm historical precedent exists for the exclusion here under discussion.

Further in this connection, Section 24 of the Constitution of Virginia provides that "no officer, soldier, seaman, or marine of the United States army or navy shall be deemed to have gained a residence as to right of suffrage in the State, or in any county, city or town thereof, by reason of being stationed therein; . . ." Counsel for appellants assert that an obvious, rational and practical justification for the exclusion of military related population exists by reason of the fundamentally transient nature of such population, the high mobility rate of such population and the essentially non-citizen character of such population. Certainly, such an exclusion is not unreasonable, and counsel for appellants wish to emphasize that *no evidence whatever* was introduced on behalf of plaintiffs in the court below which even remotely tended to demonstrate any aspect of unreasonableness in the exclusion under discussion. This want of proof is especially significant in light of the principle that "the burden of establishing the unconstitutionality of a statute rests on him who assails it" (*Baker* v. *Carr, supra,* at 266) and that one who assails a statutory classification under the Fourteenth Amendment "must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Morey* v. *Doud, supra,* at 464. The absence of any such evidence on behalf of plaintiffs surely precludes any

judicial determination that the exclusion under consideration is wholly unreasonable and therefore antagonistic to the Fourteenth Amendment.

Certainly, it is within the competency of a Legislature confronted with so complex a problem as decennial reapportionment to insure that certain areas of a State shall not be irrationally favored by reason of massive infusions of transient, mobile, non-citizen military related population. As indicated by Defendants' Exhibit 2 (R. 250), the total number of male military personnel residing in Arlington County in 1960 was 10,628. Since many men in the armed forces are married and have children, it is surely reasonable to multiply the number of males by 2½ to obtain the total figure for military related population, i.e., military personnel, their wives and children, residing in Arlington County. Multiplication of the figure 10,628 by the figure 2½ produces a total of 26,570. As previously indicated, the 1960 census figure for Arlington County showed a population of 163,401. Subtracting the former figure from the latter leaves 136,831 as the correct population figure for Arlington County to be considered for reapportionment purposes. Utilization of the figure 136,831 in determining the most excessive population variance ratio in Virginia with respect to the Senate establishes a ratio of 2.22 to 1 rather than 2.65 to 1.

Similar adjustment of the population figures of Fairfax County (including the cities of Falls Church and Fairfax City) to exclude military related population establishes that Fairfax County would have 76,980 persons per delegate, rather than 95,064 persons per delegate as determined on the basis of population figures which include military related population. Utilizing the corrected figure of 76,980 for the purpose of determining the most excessive population vari-

ance ratio with respect to the House of Delegates of Virginia establishes a ratio of 3.53 to 1 rather than 4.36 to 1.

With these ratios in mind, we now canvass the various reapportionment cases decided by State and Federal courts since the advent of *Baker*. Initially, we shall consider those cases in which the apportionment systems of certain States have been declared unconstitutional.

In *Sims* v. *Frink*, 208 F. Supp. 431, a federal District Court invalidated the apportionment system of *Alabama*. The population variance ratio with respect to the House exceeded 15 to 1, while that with respect to the Senate exceeded 20 to 1.

In *Lisco* v. *McNichols*, 208 F. Supp. 471, a federal District Court expressed disapproval of the *Colorado* apportionment system. The population variance ratio with respect to the House was 8 to 1, while that with respect to the Senate was over 7 to 1. See, also, *Stein* v. *The General Assembly of the State of Colorado*, ... Colo. ....., 374 P. (2d) 66.

In *Sincock* v. *Duffy*, 215 F. Supp. 169, a federal District Court invalidated the *Delaware* apportionment system. Prior to the 1963 amendments to the relevant Delaware statutes, the population variance ratio with respect to the House was 35 to 1, while that with respect to the Senate was 21 to 1. After enactment of the 1963 amendment, the population variance ratio with respect to the House was still over 12 to 1, while that with respect to the Senate was still over 15 to 1.

In *Toombs* v. *Fortson*, 205 F. Supp. 248, a federal District Court invalidated the *Georgia* apportionment system. The population variance ratio with respect to the House was 98 to 1, while that with respect to the Senate was over 40 to 1.

In *Harris* v. *Shanahan*, District Court of Shawnee

County, Kansas, No. 90976, the District Court invalidated the *Kansas* reapportionment system. The population variance ratio with respect to the House was over 8 to 1, while that with respect to the Senate was over 19 to 1.

In *Davis* v. *Synhorst*, 217 F. Supp. 492, a federal District Court invalidated the *Iowa* apportionment system. The population variance ratio with respect to the House was 18 to 1, while that with respect to the Senate was 9 to 1.

In *Scholle* v. *Hare*, 367 Mich. 176, 116 N. W. (2d) 350, the Supreme Court of Michigan invalidated the *Michigan* apportionment system with respect to the Senate. The population variance ratio with respect to the Senate was over 12 to 1.

In *Moss* v. *Burkhart*, 207 F. Supp. 885, a federal District Court invalidated the *Oklahoma* apportionment system. The population variance ratio with respect to the House was 14 to 1, while that with respect to the Senate was 26 to 1.

In *Sweeney* v. *Notte*, ... R. I. ....., 183 A. (2d) 296, the Supreme Court of Rhode Island invalidated the *Rhode Island* apportionment system with respect to the House. The population variance ratio with respect to the House was 22 to 1.

In *Mikell* v. *Rousseau*, ... Vt. ....., 183 A. (2d) 817, the Supreme Court of Vermont invalidated the *Vermont* apportionment system with respect to the Senate. The population variance ratio with respect to the Senate was over 6 to 1.

In *Thigpen* v. *Meyers*, 211 F. Supp. 826, a federal District Court declared invalid the *Washington* apportionment system. The population variance ratio with respect to the House was 4.65 to 1, while that with respect to the Senate was 7.25 to 1.

The population variance ratios under consideration in the above canvassed cases were variously described by the par-

ticular courts involved as "gross and glaring" disparities, *Lisco* v. *McNichols, supra* at 474; "disparities . . . of . . . a startling nature," *Sincock* v. *Duffy, supra* at 184; "great disparities" and "gross disparities" giving rise to "discrimination so excessive as to be invidious," *Toombs* v. *Fortson, supra* at 254, 256; "severe inequalities" in representation, *Davis* v. *Synhorst, supra* at 499; "grossly and egregiously" disproportionate ratios, *Moss* v. *Burkhart, supra* at 894; "grossly unequal" and "sharply disproportionate" representation, *Sweeney* v. *Notte, supra* at 301. When these ratios, thus characterized, are compared with those which exist under the Virginia reapportionment system, it is manifest that not even the most unrestrained and partisan imagination could suggest that the above cited cases support, much less compel, invalidation of the Virginia statutes in question.

We next examine those cases in which the reapportionment systems of various States have been sustained against attack under the Fourteenth Amendment in the wake of *Baker*. The ensuing analysis is also made with an eye to the fact that the most excessive population variance ratio in Virginia with respect to the House of Delegates is 4.36 to 1 based upon population figures which *include* military related population, and only 3.53 to 1 based on figures which *exclude* such population; while the most excessive population variance ratio in Virginia with respect to the Senate is 2.65 to 1 based upon population figures which *include* military related population, and only 2.22 to 1 based upon figures which *exclude* such population.

In *Sobel* v. *Adams*, 208 F. Supp. 316, a three-judge District Court for the Southern District of Florida, sustained *on the merits* the validity of the reapportionment scheme embodied in certain proposed amendments to the Florida Constitution to be submitted to the people for ratification.

Under the proposed amendments, each county in Florida would be given one representative in the House of Representatives of the State Legislature, the remaining members to be allocated on the basis of representative ratios. The Senate would consist of forty-six members, each representing a district. Each of the twenty-four most populous counties in the State would constitute a Senate district, the other twenty-two districts to be created from the remaining forty-three counties.

Under this redistricting system, the largest population per representative in the Florida House of Representatives was 62,336, while the smallest population per representative in any district was 2,868—a population variance ratio of 21.7 to 1 between such districts. Similarly, the largest Senate district in Florida based on population contained 935,047 inhabitants, while the smallest Senate district in Florida contained 14,971 inhabitants—a population variance ratio of 62.4 to 1 between such Senate districts. Although the proposed amendments to the Florida Constitution were not adopted, the three-judge District Court, *pointing out that it could not be said that the proposed amendments reached apportionment equality on a strict basis of population*, unanimously sustained the reapportionment scheme contemplated by the proposed amendments.

In *Caesar* v. *Williams*, ... Idaho ....., 371 P. (2d) 241, the Supreme Court of Idaho sustained *on the merits* the validity of the reapportionment scheme with respect to the House embraced in the constitution and statutes of Idaho. The Idaho constitution decrees that each county in the State should have one representative in the House, the remaining representatives to be allocated on the basis of certain population ratios prescribed by statute. Under this redistricting system, the largest House district in Idaho based on popula-

tion contained 16,719 inhabitants, while the smallest House district contained only 917 inhabitants—a population variance ratio of over 18 to 1. Pointing out that the constitutional requirement of one representative for each county, superimposed on the population requirement of the statute, would lead to the discrepancies between the number of people who would be represented by each individual representative in the House on a purely numerical basis, the Supreme Court of Idaho declared that the disparity there under consideration was not so clearly violative of the equal protection standard as to be unconstitutional.

In *Daniel, et al.* v. *Davis, et al.*, ... F. Supp. ..... (decided June 28, 1963), a three-judge District Court for the Eastern District of Louisiana sustained *on the merits* a recently enacted reapportionment plan for the House of Representatives of Louisiana. Under this system, one representative in the House was awarded each of the 63 parishes in Louisiana (exclusive of Orleans) and one to each of the 17 wards in the city of New Orleans. The remaining 25 seats in the House were allocated on the basis of a table of priority established in accordance with the Method of Equal Proportions distribution formula. Although this redistricting scheme produced a maximum population variance ratio of 8 to 1 in the House, it was held to be consistent with the requirements of the Fourteenth Amendment.

In *Maryland Committee for Fair Representation* v. *Tawes*, 229 Md. 406, 184 A. (2d) 715, probable jurisdiction noted ..... U. S. ....., the Court of Appeals of Maryland sustained *on the merits* the validity of the reapportionment scheme embraced in the Maryland constitution. In substance, the Maryland reapportionment scheme contemplates a House structured on the basis of population and a Senate constituted upon the basis of geographical areas or districts

without regard to population. Under this redistricting system, the most excessive population variance ratio with respect to the Senate of Maryland was 32 to 1, while that with respect to the House (supposedly constituted on the basis of population) was over 5 to 1. In spite of these numerical disparities, the Court of Appeals of Maryland sustained the validity of the Maryland reapportionment system.

In *Jackman* v. *Bodine*, 78 N. J. Super. 414, 188 A. (2d) 642, the Superior Court of New Jersey sustained *on the merits* the reapportionment scheme embodied in the New Jersey constitution. Under New Jersey law, the Senate is composed of one Senator from each county regardless of population, while the House is apportioned among the counties on a population basis, with each county entitled to at least one member of the House, the total House membership not to exceed sixty members. Under this redistricting system, the largest New Jersey Senate district in population contained 923,545 inhabitants, while the smallest such district contained only 48,555—a population variance ratio of 19 to 1 between such districts. Notwithstanding such disparity, the New Jersey redistricting system was held to be compatible with the requirements of the Fourteenth Amendment.

In *W.M.C.A. Inc.* v. *Simon*, 208 F. Supp. 368, probable jurisdiction noted ..... U. S. ....., a three-judge District Court for the Southern District of New York sustained *on the merits* the validity of the reapportionment scheme embodied in the New York Constitution. Under New York law, every county in the State (with the exception of Hamilton County which shares one Assemblyman with Fulton County) is entitled to one representative in the New York Assembly. Senate districts for representation are created

on the basis of citizen population, excluding aliens, with certain limitations upon the number of Senators any county may have.

Under this redistricting system, the largest New York Assembly district in population contained 222,261 inhabitants, and the smallest Assembly district in population contained 15,044 inhabitants—a population variance ratio of 14.7 to 1 between these districts. Similarly, the largest Senate district in New York based on population contains 666,784 inhabitants, while the smallest Senate district in New York based on population contains 168,390 inhabitants—a population variance ratio of 3.96 to 1. These New York redistricting provisions were sustained by a unanimous court in a decision which is thoroughly in accord with that of this Court in *Baker*.

In *Nolan* v. *Rhodes*, ... F. Supp. ..... (decided June 12, 1963), a three-judge District Court for the Southern District of Ohio sustained *on the merits* the validity of the reapportionment scheme embodied in the Ohio Constitution. Under Ohio law, the Senate is apportioned on the basis of population and the House on the basis of both area and population, with each county entitled to one representative regardless of population. Although this redistricting plan produced a maximum population variance ratio of almost 15 to 1 with respect to the House, the system was sustained against attack under the Fourteenth Amendment.

As previously pointed out, none of the post-*Baker* decisions in which the reapportionment systems of various States have been declared unconstitutional support, much less compel, invalidation of the Virginia statutes under consideration. By contrast, counsel for defendants now submit that the post-*Baker* decisions canvassed immediately above—in which the apportionment systems of Florida,

Idaho, Louisiana, Maryland, New Jersey, New York, and Ohio were declared constitutional—do support, and (if unreversed) *indeed compel,* complete validation of the Virginia statutes. If a State reapportionment system which gives rise to extreme population variance ratios of 62.4 to 1 (Florida), 18 to 1 (Idaho), 8 to 1 (Louisiana), 32 to 1 (Maryland), 19 to 1 (New Jersey), 14.7 to 1 (New York) and 15 to 1 (Ohio) are *not* invidiously discriminatory under the Fourteenth Amendment, then a State reapportionment system which gives rise to an extreme population variance ratio of only 4.36 (or 3.53) to 1 cannot, *a fortiori,* be invidiously discriminatory.

Moreover, Defendants' Exhibit No. 5 (R. 266), which was prepared by the Bureau of Public Administration of the University of Virginia, establishes the rank and order of Virginia in comparison with other States, based upon population, after the challenged statutes were enacted by the General Assembly of Virginia. This exhibit discloses that Virginia ranks 8th in the United States in fairness of representation, *based solely upon population figures which include military related population,* subsequent to the enactment of the 1962 redistricting statutes. In none of those States ranking higher than Virginia on this index has a suit attacking reapportionment been successfully maintained. This exhibit also discloses that Florida ranks 46th, Idaho ranks 40th, New Jersey ranks 26th, Ohio ranks 18th and New York ranks 13th in fairness of representation based solely on population. If a reapportionment system which causes a State to rank only 46th, or 40th, or 26th, or 18th, or 13th, in fairness of representation, based solely on population, is *not* invidiously discriminatory, then a reapportionment system which causes a State to rank 8th (Virginia) in fairness of representation, based solely on population, cannot, *a fortiori,* be invidiously discriminatory.

Surely, it cannot possibly be the law that the reapportionment systems of seven States which give rise to extreme population variance ratios ranging from 8 to 1 (Louisiana) to 62.4 to 1 (Florida) are *not* invidiously discriminatory under the Fourteenth Amendment, but that a State reapportionment system which gives rise to an extreme population variance ratio of only 4.36 (or 3.53) to 1 (Virginia) *is* invidiously discriminatory. Surely, it cannot possibly be the law that the reapportionment systems of seven States which causes such States to rank from 13th (New York) to 46th (Florida) in the United States in fairness of representation based solely on population are *not* invidiously discriminatory, but that a State reapportionment system which causes a State to rank 8th (Virginia) in the United States in fairness of representation based solely on population *is* invidiously discriminatory. If such is law, then the decisions of the Federal courts in reapportionment cases will themselves become a "topsy-turvical of gigantic proportions," and those decisions will necessarily create a *judicial* "crazy-quilt without rational basis." *Baker* v. *Carr, supra,* at 254.

In addition, Defendants' Exhibit No. 3 (R. 252), indicates that, in the Electoral College, the smallest population per elector exists in the State of Alaska which has 88,722 inhabitants per elector, while the largest population per elector exists in California which has 392,930 inhabitants per elector—a population variance of 4.4 to 1 as between California and Alaska. As previously pointed out, the most excessive population variance ratio in the House of Delegates of Virginia, based upon population figures which *include* military related population, is 4.36 to 1, while the most excessive population variance ratio in the Senate of Virginia, based upon such population figures, is 2.65 to 1. Thus, it is clear that, even *including* military related popu-

lation, no population variance ratio in either the House of Delegates or Senate of Virginia exceeds the population variance ratio which exists in the Electoral College. Counsel for appellants submit that no invidious discrimination antagonistic to the Fourteenth Amendment can exist in a State reapportionment system which contains no population variance ratio which exceeds that of the Electorial College.

The recent decision of this Court in *Gray* v. *Sanders*, ... U. S. ....., decided March 18, 1963, does not express a contrary view. In that case, this Court had occasion to review an order of the three-judge District Court for the Northern District of Georgia, one aspect of which held that the use of the county unit system in counting the votes in a statewide election was permissible "if the disparity against any county is not in excess of the disparity that exists against the state in the most recent electoral college allocation." See, *Sanders* v. *Gray*, 203 F. Supp. 158, 170. Holding that the analogy to the Electoral College was inapposite to the situation presented in that case, this Court pointed out (..... U. S. at .....):

> "Nor does the question here have anything to do with the composition of the state or federal legislature. And we intimate no opinion on the constitutional phases of that problem beyond what we said in *Baker* v. *Carr*, *supra*. *The present case is only a voting case.* (Italics supplied)

Similar emphasis was also placed upon the nature of the question there presented by Mr. Justice Stewart, with whom Mr. Justice Clark joined, in his dissenting opinion (..... U. S. at .....):

> *"This case does not involve the validity of a State's apportionment of geographic constituencies from which representatives to the State's legislative assembly are*

> *chosen, nor any of the problems under the Equal Protection Clause which such litigation would present.* We do not deal here with 'the basic ground rules implementing *Baker* v. *Carr.*' This case, on the contrary, involves statewide elections of a United States Senator and of state executive and judicial officers responsible to a statewide constituency. Within a given constituency, there can be room for but a single constitutional rule—one voter, one vote." (Italics supplied)

At this point, it may be well to mention that no "county unit" or other "weighted" voting procedures exist in Virginia. In all statewide elections for United States Senator or State executive officials responsible to a statewide constituency, the constitutional rule of "one voter, one vote" enunciated in *Gray* v. *Sanders, supra,* prevails and always has prevailed. With respect to the applicability of the electoral college analogy to the problem of the reapportionment of State legislatures, counsel for appellants would call the Court's attention to the view expressed by Mr. Justice Harlan in his dissenting opinion in *Gray* v. *Sanders, supra,* at .....:

> "One need not close his eyes to the circumstance that the Electoral College was born in compromise, nor take sides in the various attempts that have been made to change the system, in order to agree with the court below that it 'could hardly be said that such a system used in a state among its counties, assuming rationality and absence of arbitrariness in end result, could be termed invidious.' "

The position taken by Mr. Justice Harlan was adopted by the three-judge District Court for the Northern District of Georgia with respect to the State legislative reapportionment in *Toombs* v. *Fortson, supra.* See, III Constitutional

Decisions on Legislative Apportionment (National Municipal League), *Toombs* v. *Fortson*, p. 6. In that case, the District Court declared:

> *"Whatever comports with the national legislative standard, assuming rationality and absence of arbitrariness in end result, can hardly be termed invidious.* Cf. discussion in *Sanders* v. *Gray*, N.D. Ga., 1962, 203 F. Supp. 158, 169, of the federal electoral college system as a standard in determining the legality of the Georgia County Unit System. The national system of one body of the legislative branch being based on population and one on geography has withstood the test of time. It is fundamental in a government founded and maintained on a deliberate system of checks and balances. *It protects the minority from the excesses of the majority, and is one of the principal reasons for a bicameral as distinguished from a unicameral legislature.* A majority of the United States Senate is elected by approximately seventeen percent of the population of the United States, and this is not substantially out of line with the majority plan where approximately fifteen percent of the population of Georgia would elect the majority of the Georgia House. Of course, it may be argued that the extreme disparity between the largest and smallest counties in Georgia would violate the national standard *but we are unaware of any authority that requires a ruling that a legislature so constituted would violate the plaintiffs' constitutional rights."* (Italics supplied)

Furthermore, in his dissenting opinion, Mr. Justice Harlan pointed out that:

> "The disproportions in the Georgia County Unit System are indeed not greatly out of line with those existing under the Electoral College count for the Presidency. The disparity in population per Electoral Col-

lege vote between New York (the largest State in the 1960 census) and Alaska (the smallest) was about 5 to 1. There are only 15 Georgia counties, out of a total of 159, which have a greater disparity per unit vote, and of these 15 counties 4 have disparity of less than 6 to 1. *It is thus apparent that a slight modification of the Georgia plan could bring it within the tolerance permitted in the federal scheme.*" (Italics supplied)

As previously demonstrated in this brief, no House or Senate district in Virginia has a population variance ratio which exceeds that of the Electoral College, even when such ratios are computed on the basis of figures which include military related population. It is thus manifest that no modification whatever is required to bring the Virginia reapportionment system within the "tolerance permitted in the federal scheme." And if military related population is excluded in computing such ratios, the resulting variance is well within the outer limits of the Electoral College disparities.

Finally, Defendants' Exhibit No. 7 (R. 280) discloses that 20 of the 40 members of the Senate of Virginia represent urban areas of the Commonwealth, while 20 of the 40 members represent rural areas. Similarly, Defendants' Exhibit No. 8 (R. 291) discloses that 48 of the 100 members of the House of Delegates of Virginia represent urban areas of the Commonwealth while 52 of the 100 members represent rural areas. It is thus unarguably apparent that no such epithets as "rural stranglehold" or "barnyard government" can possibly be leveled at the Virginia system.

In light of the foregoing, counsel for appellants assert that the statutes challenged in the case at bar are not invidiously discriminatory under the Fourteenth Amendment when the various aspects of Virginia's over-all reapportion-

ment system are considered. Before proceeding to an analysis of the several elements of that system, counsel believe it desirable to emphasize certain underlying principles applicable to litigation of this character which have often been stated by this Court and which have been recently reaffirmed in *Baker* and other post-*Baker* decisions. Foremost among these principles is that enunciated in *MacDougall* v. *Green*, 335 U. S. 281, 283-284, and restated with approval in *Baker*, *supra* at 265-266, 283, in the following language:

> *"To assume that political power is a function exclusively of numbers is to disregard the practicalities of government.* Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. *It would be strange indeed, and doctrinaire, for this Court,* applying such broad constitutional concepts as due process and equal protection of the laws, *to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses,* in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. *The Constitution—a practical instrument of government—makes no such demands on the States."* (Italics supplied)

Moreover, in *Baker*, *supra* at 244-245, 258, 260, this Court proclaimed:

> "The traditional test under the Equal Protection Clause has been whether a State has made 'an invidious discrimination,' as it does when it selects 'a particular race or nationality for oppressive treatment.' . . . *Universal equality is not the test: there is room for weighting.*
>
> * * *

"No one . . . contends that mathematical equality among voters is required by the Equal Protection Clause.

* * *

"Moreover, *there is no requirement that any plan have mathematical exactness in its application.* Only where, . . . the total picture reveals incommensurables *of both magnitude and frequency* can it be said that there is present an invidious discrimination." (Italics supplied)

In *W.M.C.A. Inc.* v. *Simon, supra* at 384-385, the three-judge federal District Court—which unanimously sustained the New York reapportionment system on the merits—stated:

"'Invidious discrimination' is an irrational and inconstant action against a group of citizens. We do not find that the New York State apportionment policy is irrational; *all that plaintiffs have illustrated is that the apportionment is not based solely on population.* But as was said in *MacDougall* v. *Green,* 335 U. S. 281, 283, 69 S. Ct. 1, 2,

"'To assume that political power is a function exclusively of numbers is to disregard the practicalities of government.'

"There are other criteria for determining apportionment besides population. In *Baker* v. *Carr,* Justice Harlan said:

"'Nothing in the federal constitution [stops] a State from choosing a legislative structure it thinks is best suited to the interests, temper, and customs of its people. . . .'" (Italics supplied)

In *Sobel* v. *Adams*, *supra* at 321-323, the three-judge federal District Court—which sustained on the merits a Florida reapportionment system contemplated in certain proposed constitutional amendments—declared:

> *"It is not required that, in all events, either or both houses of a bicameral legislature must be apportioned upon a population basis of either exact or approximate equality of representation.* It is only when the discrimination is invidious or lacking in rationality that it clashes with the Equal Protection clause of the Fourteenth Amendment.
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> * * *
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> "It is our considered view that the rationality of a legislative apportionment may include *a number of factors in addition to population.*
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> * * *
>
> "Once it has been determined, and we do so determine, that it is permissible so to apportion the Florida House of Representatives as to allot at least one member to each county, the question arises as to whether this can be and that there also be an apportionment on a strict basis of population. It is obvious that this cannot be done. . . . The zeal of the advocates of strict apportionment by a rigid population allocation fails to convince us that the results so achieved would be rational. The plan proposed by the Legislature of a representative from each county with additional representatives distributed on a basis of a population ratio seems to us to provide a formula *which secures the desirable county representation and a reckoning, to the extent required, of the population factor."* (Italics supplied)

In *Baker* v. *Carr*, 206 F. Supp. 341, 345-346, the three-judge federal District Court—on remand of *Baker*—observed:

> *"We find no basis for holding that the Fourteenth Amendment precludes a state from enforcing a policy which would give a measure of protection and recognition to its less populous governmental units.* These subdivisions constitute an integral and historic part of the state's governmental structure. They have real and substantial interests in the state's laws, and the state could reasonably conclude that its best interests would be subserved by their effective participation in state government and in the formulation of its laws and policies. *The state has the right, if it sees fit, to assure that its smaller and less populous areas and communities are not completely overridden by sheer weight of numbers."* (Italics supplied)

Finally, in *Daniel* v. *Davis,* ..... F. Supp. ....., decided June 28, 1963, the three-judge Federal District Court which sustained on the merits the reapportionment of the House of Representatives of Louisiana proclaimed:

> "Federal judges should tread lightly on ground historically within the province of state legislatures. Nevertheless we must fashion some test giving recognition to the right of the state's electorate to have adequate representation in state government. We conclude that legislative apportionment complies with the Equal Protection Clause if the apportionment plan, considered as a whole, has a rational basis *and gives importance to population as a major factor. In applying the test the Court will not weigh with exactitude the legislative plan against a plan based on perfect equality."* (Italics supplied)

With these principles in mind, it is initially significant that the Virginia reapportionment system does not contemplate that each political subdivision (city or county) of the State shall be entitled to one representative in either the

House of Delegates or Senate of Virginia. It is the district —not the political subdivision—which forms the basic unit for representation in the General Assembly of Virginia. Moreover, the Virginia reapportionment system is not patterned after the Congress of the United States, i.e., one body of the General Assembly constituted on the basis of population and the other structured on the basis of geographic area without regard to population. It is the absence of these requirements—either of which would be constitutionally permissible—which accounts for the relatively small population variance ratios existing under the Virginia system, as compared with the more extreme population variance ratios which exist in the valid Florida, Louisiana, Idaho, Maryland, New Jersey, New York and Ohio schemes.

The reapportionment of the General Assembly of Virginia effected by Sections 24-12 and 24-14 of the Virginia Code embraces the following constituent elements:

(1) Every House or Senate district containing more than one political subdivision should be composed of contiguous political subdivisions.

(2) The geographical integrity of each political subdivision should be preserved, i.e., no city or county boundary line should be broken in establishing House or Senate districts.

(3) When possible, the predominant geographic divisions of the Commonwealth (Tidewater, Piedmont, Southside, Valley and Southwest) should be observed, so that House and Senate districts may lie wholly within one such division, thus preserving the community of interests of the inhabitants thereof.

(4) As nearly as practicable, numerical equality between Delegates and Senators representing urban districts and those representing rural districts should be achieved.

(5) In general, geographically compact House and Senate districts containing a relatively small square mile area and a highly concentrated number of inhabitants—thus rendering a representative more easily accessible to his electorate—should contain a relatively higher population than those less compact districts having larger square mile areas and more limited representative-electorate accessibility.

(6) In general, the House and Senate districts possessing a greater number of political subdivisions (cities, counties or towns) and a larger number of constitutional officers should contain a relatively smaller population than those districts comprising a single city or county.

(7) Within the framework of the above enunciated criteria, population should be the predominant factor in reapportionment so that excessive population variance ratios may be avoided — military related population comprising transient, mobile, non-citizen inhabitants to be excluded in determining such population for the purposes of representation.

When these criteria are applied to the situation which obtains with respect to Arlington County, Fairfax County and the City of Norfolk, it is manifest that the Virginia reapportionment system effects no invidious discrimination against the citizens of such political subdivisions. With military related population excluded, Arlington County has

a population of 45,610 inhabitants per Delegate and 136,831 persons per Senator. These figures compare favorably with the "ideal representation" figures of one Delegate for each 39,669 inhabitants and one Senator for each 99,174 persons. This is especially true when one considers that Arlington County is a relatively small, densely populated county, having an area of only 24 square miles (less than half the size of the city of Norfolk), and that elected representatives of Arlington County represent only one political subdivision (the county itself) which contains only one governing body and one set of constitutional officers. See, Defendants' Exhibits Nos. 7 and 8 (R. 276, 289).

Similar adjustment of the population figures for Fairfax County to exclude military related population discloses that Fairfax County has 76,980 inhabitants per delegate and 115,471 persons per Senator. These ratios also compare favorably with the "ideal representation" figures when one considers that the district comprising Fairfax County, Fairfax City and the City of Falls Church has an area of only 407 square miles while other districts which are less heavily populated have areas ranging up to 2,776 square miles. See, Defendants' Exhibits 7 and 8 (R. 276, 286).

So far as the city of Norfolk is concerned, adjustment of its population figures to exclude military related population reveals that Norfolk has only 31,049 inhabitants per Delegate and only 93,148 persons per Senator, compared to the ideal representation figures of 39,669 and 99,174, respectively. Thus, with military related population excluded, *Norfolk is actually over-represented in both the House and Senate of Virginia on a strict population basis.* When one considers that Norfolk is also a densely populated area of only fifty square miles and that elected representatives of Norfolk represent only one political subdivision (the city itself) which contains only one governing body

and one set of constitutional officers, it is obvious that the Virginia reapportionment system effects no invidious discrimination against the City of Norfolk. See, Defendants' Exhibits 7 and 8 (R. 275, 283).

If the 1960 census figures are adjusted for military related population, the variance in population between the areas in which appellees reside and other areas of the State is considerably reduced. If, as stated in *MacDougall* v. *Green, supra,* at 284, and approved in *Baker, supra* at 266, the Fourteenth Amendment does not "deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses," then the General Assembly of Virginia could properly balance the representation of less populous areas and heavily populated metropolitan districts, even if the latter areas were inhabited entirely by citizens. And if, as stated in *Baker* v. *Carr, supra,* at 346, a State may "assure that its smaller and less populous areas and communities are not completely overridden by sheer weight of numbers," then certainly the General Assembly of Virginia could properly assure that less populous areas of Virginia were not completely overwhelmed by the sheer weight of numbers, grossly inflated with military related population, in certain areas geographically propinquant to the national capital and the Atlantic ocean. Yet the majority of the court below ignored these adjusted figures when it found "invidious discrimination" to exist with respect to the inhabitants of Arlington County, Fairfax County and the City of Norfolk.

Moreover, the majority jurists in the court below gave no consideration whatever to the factors of (1) relative size of various districts, (2) number of political subdivisions in various districts, (3) density of population in various districts and (4) relative representative-elector accessibility, as

disclosed by the extensive evidence marshaled in defense of the Virginia reapportionment system. Nor was any proper application of the principles that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others" and that "the burden of establishing the unconstitutionality of a statute rests on him who assails it" *Baker* v. *Carr, supra,* at 266, made, or even attempted, by the majority.

Finally, the majority opinion of the court below is highlighted by the total absence therefrom of any reference whatever to (1) the relatively minor population variance ratios which exist under the Virginia reapportionment system, even if such ratios are computed on the basis of figures which *include* military related population, (2) the Electoral College data summarized, *ante,* pp. 46, 47, and (3) the rank order of Virginia (8th) in fairness of representation as contrasted with the rank order of other States in which reapportionment plans have been judicially approved. Consistent with the absence of any such references is the failure of the majority *even to mention* the decisions of the three-judge District Courts in *Sobel* v. *Adams, supra,* and *W.M.C.A., Inc.* v. *Simon, supra.* It fell to the dissenting judge to point out that in the latter of the above-mentioned cases, a three-judge federal District Court had validated the New York reapportionment system, in which system the weighted vote demonstrated "a far greater disparity than that which exists in Virginia." *Mann* v. *Davis, supra* at 589.

In addition, in his opinion in the court below, *Mann* v. *Davis, supra,* at 586, 588, 589, the dissenting judge canvassed the situation which has obtained with respect to reapportionment in Virginia and noted (1) that Virginia—unlike the legislatures of many states—has consistently reapportioned

its senatorial and house districts decennially in accordance with the mandate of Section 43 of the Virginia Constitution; (2) that other districts which may have been disadvantaged by the 1962 reapportionment "have not seen fit to attack the constitutionality" of the statutes in controversy; and (3) that if additional representatives were awarded to Fairfax, Arlington and Norfolk, such representatives "must be taken from other areas" and the court "would undoubtedly be faced with further litigation" by other districts.

Thereafter, the dissenting judge made the following pertinent observations and inquiries:

> "In my judgment the decision of the majority *places too much emphasis* upon the weighted vote of one county, city, or district as contrasted with the weighted vote in another county, city or district.
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> * * *
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> "Granting relief at this time without sufficient guidepost to govern our action *establishes a dangerous precedent.*
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> * * *
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> ". . . the mere failure to disprove discrimination by population does not, in my opinion, establish 'invidious' discrimination *when Virginia's overall picture is reviewed.*
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> * * *
>
> "Virginia stands eighth in the nation in an index of representatives among state legislatures as prepared by the Bureau of Public Administration of the University of Virginia subsequent to the passage of the 1962 Act. More proportionate representation is available only in Oregon, Massachusetts, New Hampshire, West Virginia, Maine, Wisconsin and Alaska. In determining whether the 1962 Reapportionment Act constituted 'arbitrary and capricious state action' or,

> as described by the majority, 'individious' discrimination, *are we to look at the entire pattern of apportionment or should we only consider apportionment of one district as against another? These are, in my judgment, unanswered questions.*" (Italics supplied)

Obviously, the majority jurists in the court below could not hope to harmonize their conclusion with the decisions in the Florida (*Sobel* v. *Adams, supra*) and New York (*W.M.C.A., Inc.* v. *Simon, supra*) cases, nor can that conclusion now be squared with the decisions of other State and Federal courts in the Idaho (*Caesar* v. *Williams, supra*), Louisiana (*Daniel* v. *Davis, supra*), Maryland (*Maryland Committee for Fair Representation* v. *Tawes, supra*), New Jersey (*Jackman* v. *Bodine, supra*) and Ohio (*Nolan* v. *Rhodes, supra*) reapportionment cases. Certainly, no one will have the temerity to suggest that the Equal Protection Clause of the Fourteenth Amendment imposes some higher standard upon—or requires something more from—Virginia than is required of the other forty-nine States in the Union. If the Virginia reapportionment system is ultimately invalidated, then the reapportionment systems of the other forty-two States in the Union which rank lower than Virginia in fairness of representation must necessarily be annuled. If the decision of the majority in the court below is ultimately sustained, and the decisions of the various State and Federal courts approving the reapportionment plans of Florida, Idaho, Louisiana, Maryland, New York, New Jersey and Ohio remain unreversed, the result of this Court's historic decision in *Baker* will be merely the substitution of an irrational, no-policy *judicial* standard of legislative apportionment for the irrational, no-policy *legislative* standard currently alleged to be in effect in the various States.

CONCLUSION

In *Baker* v. *Carr, supra,* this Court held that the plaintiffs had set out in their complaint a justiciable cause of action which they had standing to maintain and the District Court had jurisdiction to hear. The salient aspects of the Tennessee apportionment system are now well known and have previously been summarized in this brief. *Ante,* pp. 30, 31. In contrast to the situation there under consideration, the significant features of the case at bar stand out in bold relief:

1. The General Assembly of Virginia has consistently reapportioned the Commonwealth decennially in accordance with the mandate of Section 43 of the Virginia Constitution.

2. Complete relief is available to the plaintiffs in the Supreme Court of Appeals of Virginia. In 1932, that Court (a) invalidated an enactment of the General Assembly of Virginia which failed to reapportion the Commonwealth for congressional representation according to population as required by Section 55 of the Virginia Constitution and (b) directed congressional elections for that year to be conducted on an "at large" basis. Indeed, a suit to obtain such relief is even now pending in the Circuit Court of the City of Richmond, has been heard and argued and is presently awaiting decision. *Tyler* v. *Davis, supra.*

3. The only discrimination alleged or attempted to be established by plaintiffs in the case at bar is one "exclusively of numbers" based solely on certain variances in population between districts. No suggestion is made that the challenged statutes discriminate against any individual, group or district upon the basis

of race, creed, national origin, political persuasion or rural-urban character.

4. *Based solely on population,* Virginia ranks 8th in the United States in fairness of representation subsequent to the enactment of the challenged statutes. No reapportionment suit has been successfully maintained in any State having a higher rank on this index, while reapportionment systems of States having lower rank on such index have been judicially approved.

5. The most excessive population variance ratio in Virginia, *based solely on population,* does not exceed that which exists in the Electoral College of the United States.

6. The majority opinion of the court below made no reference to any factor other than population figures, and that no consideration to the factors of military related population, relative size of various districts, number of political divisions in various districts or density of population in various districts.

When these significant features are viewed in light of the "settled principles" applicable to litigation of this character, counsel for appellants submit that the majority decision in the court below is clearly erroneous. Initially, we point out that this Court's historic opinion in *Baker* did not involve application of the doctrine of abstention and that the principles previously enunciated by this Court concerning the applicability of that doctrine are still in full force and effect. Moreover, counsel for appellants assert that the Virginia reapportionment statute challenged in the instant case effect no invidious discrimination antagonistic to the Fourteenth Amendment against the citizens of any House or Senate

district in Virginia, even if such statutes are considered on the basis of population figures which include military related population. In addition, we maintain that military related population may properly be excluded in determining the number of inhabitants in each district for the purpose of representation, and that—with such population excluded—the statutes in question are invulnerable upon attack upon Federal constitutional grounds.

In light of the foregoing, counsel for appellants submit that the decision of the court below should be reversed and the cause remanded to the District Court with instructions to (1) dismiss the complaint on the merits or (2) in the alternative, to abstain from conducting further proceedings pending decision of the case of *Tyler* v. *Davis* by the Supreme Court of Appeals of Virginia.

Respectfully submitted,

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PROOF OF SERVICE

I, R. D. McIlwaine, III, one of counsel for the appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of August, 1963, I served copies of the within Brief on Behalf of Appellants on the several appellees herein by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows: Edmund D. Campbell, Esquire, Southern Building, Washington, D. C.; E. A. Prichard, Esquire, 106 N. Payne Street, Fairfax, Virginia; Sidney H. Kelsey, Esquire, 1408 Maritime Tower, Norfolk, Virginia; Henry E. Howell, Jr., Esquire, 808 Maritime Tower, Norfolk, Virginia; and Leonard B. Sachs, Esquire, Citizens Bank Building, Norfolk, Virginia.

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Assistant Attorney General